Supreme Court, U.S.
FILED

051600 JUN 14 2006

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No.

IN THE

Supreme Court of the United States

JACQUELINE ALLEN, PETITIONER

v.

CHRISTOPHER ALLEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a debtor-physician with long-term financial health pursue in good faith a Chapter 13 plan in Montana under the bankruptcy laws just two days before the arbitration of his ex-wife's claim against him in California state court for injuries caused by his vicious attack upon her; where such a claim could not have been discharged under Chapter 7; where his plan makes no provisions at all for paying his ex-spouse for her injuries or for her inordinate medical expenses; and where his sole motivation was *not* to achieve a "fresh start" but to avoid paying anything to his ex-spouse?

2. In view of the disparate decision in the several circuits addressing the dimensions of good faith in filing a Chapter 13 bankruptcy plan, should this Court as a matter of federal superintendence and sound social policy enunciate a new rule that a debtor who has committed a heinous attack upon his spouse causing her severe personal injuries as well as a lifetime disability and who possesses the capacity eventually to pay the state court judgment rendered against him on account of his attack, cannot in good faith pursue a Chapter 13 plan in bankruptcy which makes no accommodation for paying damages to his ex-spouse for her injuries as well as for the medical bills she incurred?

3. Has the decision below violated "fundamental law" by denying the petitioner due process and the equal protection of the laws?

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The unpublished opinion of the United States Court of Appeals for the Ninth Circuit in *Jacqueline Allen v. Christopher Lynn Allen*(C.A. No. 04-35713),decided January 19, 2006, affirming the District Court's order upholding the bankruptcy judge's decision that the petitioner's assault and battery judgment against the respondent is dischargeable under the Bankruptcy Code, is set forth in the Appendix hereto(App. 1-3).

The unpublished Order of the United States District Court for the District of Montana, Billings Division, in *Jacqueline Allen v. Christopher Lynn Allen*(Docket No. CV 04-35), decided July 8, 2004, upholding the bankruptcy judge's decision that the petitioner's assault and battery judgment against the respondent could be discharged under the Bankruptcy Code, is set forth in the Appendix hereto(App. 4-9)

The unpublished Order of the United States Bankruptcy Court for the District of Montana, in *In re: Christopher Lynn Allen; Jacqueline Allen v. Christopher Lynn Allen*(Case No. 99-10412-13), decided March 10, 2004, deciding that the petitioner's assault and battery judgment against the respondent is subject to the discharge provisions of Chapter 13 of the Bankruptcy Code (App. 10-17).

The unpublished order of the United States Court of Appeals for the Ninth Circuit in *Jacqueline Allen v. Christopher Lynn Allen*(C.A. No. 04-35713), decided March 16, 2006, denying the petitioner's timely filed petition for rehearing and rehearing *en banc*, is set

forth in the Appendi..reto(App. 18).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit affirming the District Court's order upholding the bankruptcy judge's determination that the petitioner's assault and battery judgment against the respondent could be discharged in bankruptcy is dated January 19, 2006; and its order denying the petitioner's timely filed petition for rehearing and rehearing *en banc* was filed and decided on March 16, 2006(App.1;18).

This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of the petitioner's timely filed petition for rehearing and rehearing *en banc*. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

11 U.S.C. Section 109(e):

Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of

less than$250,000 and noncontingent, liquidated, secured debts of less than $750,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $250,000 and noncontingent, liquidated, secured debts of less than $750,000 may be a debtor under chapter 13 of this title.

11 U.S.C. Section 523(a)(6):

A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt----

....

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. Section 1325 (a)(3) and (b)(1):

Except as provided in subsection (b), the court shall confirm a plan if----

....

(3) the plan has been proposed in good faith and not by any means forbidden by law;

....

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan----
(A) the value of the property to be distributed under the the plan on account of such claim is not

less than the amount of such claim; or
(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

11 U.S.C. Section 1328(a):

As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt----
(1) provided for under section 1322 (b)(5) of this title;
(2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title; or
(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime.

11 U.S.C. Section 1329(a):

At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, of the holder of an allowed unsecured claim,
to—
(1) increase or reduce the amount of payments on claims of a particular class provided for by the

plan;

(2) extend or reduce the time for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

STATEMENT

The petitioner Jacqueline Allen ("the petitioner") and the respondent Christopher Lynn Allen ("the respondent" or "the debtor") were married for seventeen (17) years and lived mostly in Southern California. The respondent was an emergency room physician at Desert Regional Medical Center in Palms Springs and the petitioner was employed as the respondent's business manager, bookkeeper and his general office support(App. 4).

During the evening hours of April 13, 1996, while the parties were still married and living in Rancho Mirage, California, the respondent while alone and while intoxicated with a blood/alcohol level of .15, drove the parties' Jeep Grand Cherokee through an intersection and over a curb into a restaurant parking lot at 40 miles per hour. He was arrested by the Riverside County Police for driving while under the influence of intoxicating liquor and then held at the jail in Indio, California, for five hours. Released in the early morning hours of April 14, 1996, the respondent returned home to Rancho Mirage, where the petitioner was waiting up for him, unaware that he had been either arrested or jailed for his driving offense.

Immediately upon his return home, the respondent demanded that the petitioner give him Vicodin and Valium as well as the keys to the parties' other automobile. When the petitioner refused because the respondent was unfit to drive, he flew into a rage. While screaming expletives, he grabbed the petitioner's throat with both his hands so that he shut off her breathing. He then moved one of his hands up to her chin and with its heel struck the petitioner's chin in an upward motion, shattering her teeth. The respondent then struck the petitioner with a closed fist on her left cheek, her right cheek and the top right side of her head; and he pulled downward on the back of her head while he turned and twisted her neck in a "snapping" maneuver.

As a result of this vicious assault and battery by the respondent, one witnessed by the petitioner's mother who was visiting the parties, the petitioner suffered and continues to suffer from severe tempor... mandibular joint dysfunction (TMJ), i.e., severe damage to the area where the petitioner's jaw connects with her cranium. This chronic condition causes the petitioner permanent, severe, unremitting pain, discomfort and anguish, resulting insomnia, disability and a reliance upon pain killers in order to carry on the least of her everyday functions. This disability, in turn, has caused the petitioner to suffer from severe depression, nervous disorders and other psychological deficits including paranoia, hopelessness and suicidal ideation; she needs daily care and assistance to live and is unable to support herself with employment. The petitioner's health is now poor and she sees both a psychiatrist and a psychologist in order to deal with her physical and psychological losses occasioned by the

respondent's attack of April 14, 1996. She has no health insurance but significant medical bills.

Immediately after this assault and battery by the respondent upon the petitioner, the parties separated on April 15, 1996. The respondent eventually entered a guilty plea to the DUI charge and was placed on probation. On April 14, 1997, one year after the respondent's assault and battery, the petitioner brought a civil suit against the respondent in the California state court seeking damages for the physical and psychological losses she sustained as the result of his attack upon her.

The parties were also formally divorced in December of 1998 by the California Superior Family Law Court. In its Trial Statement of Decision, the Family Law Court found that the petitioner

> is operating under physical disabilities, namely, TMJ and nervous disorders. *It is unlikely that she will be self-supporting at any point in time that the Court can foresee.* Her health is poor.

In Re Marriage of Allen, No. IND 045384, Statement of Decision, paragraph 46(September, 1998)(emphasis supplied).

By February of 1999, the petitioner's 1997 state court action in California against the respondent for damages resulting from his attack upon her had been ongoing for almost two years and was set down for court-ordered arbitration on February 26, 1999. However, *two days* before this event, on February 24, 1999, the respondent began a voluntary Chapter 13

bankruptcy petition in the Bankruptcy Court for the District of Montana. The petitioner subsequently was able to obtain relief from the automatic stay provisions of the Bankruptcy Code so that she could continue to pursue her state court action against the respondent in California for damages caused by his assault/battery.

On August 3, 1999, the respondent filed a modified Chapter 13 plan in Montana which proposed a five-year repayment schedule to the trustee in bankruptcy for the benefit of some of his unsecured creditors, including the IRS as a priority claim; but there was no provision for paying the petitioner either for her injuries which he caused or for the medical costs resulting from them. The petitioner therefore objected because the respondent's plan sought to escape the expected compensation due her as a result of her pending state court action for tort damages arising from the willful and malicious injuries he inflicted upon her; that these claims could not and should not be discharged under 11 U.S.C. Sections 523(a)(6) and 1328(a); that her claims exceed the statutory limit of 11 U.S.C. Section 109(e); and that any discharge under Chapter 13's "super discharge" provisions "violates...Congress' intent of not having claims for willful and malicious injuries discharged in bankruptcies" and denies her due process as well as the equal protection of the laws as an unsecured creditor. Thus the petitioner argued that even if 11 U.S.C. Section 1328(a), allows for the discharge of her claims against the respondent for his willful and malicious conduct, it is contrary to Congress' intent and undermines the petitioner's constitutional right to equal treatment under the law.

In addition, the petitioner asserted that the respondent submitted his Chapter 13 plan in bad faith within the meaning of 11 U.S.C. Section 1325(a)(3). That is, his bankruptcy plan was pursued *not* to obtain a "fresh start" under the bankruptcy laws but rather to escape the nondischargeable debts under Chapter 7 which he owes the petitioner; that he proposed a "zero percent plan" whereby he would pay *nothing at all* to the petitioner on her claim against him for personal injuries; that his plan failed to include substantial repayment to unsecured creditors such as the petitioner; and that in furtherance of his scheme to avoid paying the petitioner, he began his Chapter 13 proceedings in Montana less than 48 hours before court-ordered arbitration of the petitioner's claim for tort damages in the California courts.

On December 6, 1999, the bankruptcy court issued an order confirming the respondent's modified Chapter 13 plan(App. 5). It concluded that the plan was proposed in good faith because the respondent was dedicating all of his disposable income under the plan. *In re Allen*, 241 B.R. 710 (Bankr. D. Mont. 1999). The only factor weighing against the respondent's good faith was his "potential discharge of a nondischargeable debt [to the petitioner] which at this time is unproven, unliquidated and contingent." *Id.* The bankruptcy court further denied the petitioner relief from the automatic stay provisions so that she could seek in the Family Law Court an award of extraordinary health costs from the respondent incident to the divorce decree. *Id.*

In May of 2000, the district court in Montana affirmed the bankruptcy court's confirmation of the respondent's plan(*Id.*). On January 11, 2002, the court of

appeals for the Ninth Circuit likewise affirmed the confirmation of the respondent's Chapter 13 plan.(*Id.*). See *Allen v. Allen*, 23 Fed. Appx. 859, 860(9th Cir. 2002).

On March 12, 2002, the petitioner's California suit for damages against the respondent seeking damages for her personal injuries culminated in a verdict entered by the Superior Court for Riverside County in the petitioner's favor for $1.28 million(App. 6). On March 8, 2004, the bankruptcy court in Montana held a hearing on whether the petitioner's civil judgment against the respondent was dischargeable under Chapter 13(App. 6).

On March 10, 2004, the bankruptcy court issued an order determining that the petitioner's state court judgment against the respondent in the amount of $1.28 million, although the result of a willful and malicious attack by the respondent, was nonetheless dischargeable under the Bankruptcy Code when the respondent's Chapter 13 plan was completed with his March, 2004 payment(App. 6;10-17). While concluding that the petitioner's injuries were, in fact, caused by the willful and malicious acts of the respondent within the definition of 11 U.S.C. 523(a)(6), so that this debt would not be discharged if a debtor elected to proceed under a Chapter 7 bankruptcy, it ruled nonetheless that the petitioner's state court judgment was dischargeable under a Chapter 13 bankruptcy(App. 15-16). It therefore dismissed the petitioner's complaint leaving the petitioner with no remedy for recovering her damages for pain and suffering, her disabilities and her medical costs resulting from the respondent's attack (App. 16-17).

The petitioner appealed this determination to the district court which affirmed the bankruptcy judge(App. 4-9). Reviewing the bankruptcy court's findings under a clearly erroneous standard and its rulings of law *de novo*, the district judge first noted that the petitioner did not move to modify the respondent's confirmed Chapter 13 plan under 11 U.S.C. Section 1329, as soon as her state court judgment had crystallized in the form of a damage award in 2002. In addition, the district court noted that "[c]ourts have repeatedly upheld Congress' decision to prohibit the discharge of willful and malicious claims in Chapter 7 cases---while allowing their discharge in [a] Chapter 13 case"(App. 7). The district judge agreed with the court of appeals for the eighth and the tenth circuits which have held that "a plain reading of the Bankruptcy Code reveals that willful and malicious injury claims, while not dischargeable under Chapter 7, may be discharged under Chapter 13"(App. 8).

Upon the petitioner's appeal, the court of appeals for the ninth circuit court of appeals affirmed the district court's ruling(App. 1-3). It first determined that the applicable version of 11 U.S.C. Section 1328(a), providing for the discharge of debts, made no exception for debts related to willful and malicious injury caused by the debtor; and that such debts are dischargeable under Chapter 13(App. 2).

However, the court thought that the question of whether the respondent had proposed his modified plan *in good faith* despite making no provision at all for paying the petitioner's state court tort judgment (a judgment which post-dated the court of appeals' earlier decision in *Allen v. Allen*, 23 Fed. Appx. 859, 860(9th

Cir. 2002)) "is a more difficult question"(App. 2). Yet it refused to resolve this issue since the petitioner had not brought her claim timely(*Id.*). According to the court, the petitioner should have brought her claim founded on the 2002 state judgment to the bankruptcy court before January of 2004, when the bankruptcy court first learned of this state court judgment(App. 2). Even though the respondent had not by then completed his modified Chapter 13 plan (he eventually did so in March of 2004), the court ruled that it "had no opportunity to revisit the validity of the plan"(App. 2-3).

The court of appeals accordingly affirmed the district court's ruling upholding the bankruptcy judge's decision that the petitioner's $1.28 million judgment against the respondent for his assault and battery is dischargeable under Chapter 13 of the Bankruptcy Code(*Id.*).

On March 16, 2006, the Court of Appeals denied the petitioner's timely filed petition for rehearing and rehearing *en banc*(App. 18).

REASONS FOR GRANTING THE PETITION

1. The Decision Below Subverts Congress' Intent In Enacting Chapter 13 of the Bankruptcy Code That Creditors Be Paid At Least Part Of The Debt And It Cannot Be Justified By The Ruling On This Record That The Debtor-Respondent Prosecuted His Modified Chapter 13 Plan In "Good Faith."

A debt which is caused by a "willful and malicious injury" to another cannot be discharged under Chapter 7 of the Bankruptcy Code. 11 U.S.C.

Section 523(a)(6). But this kind of debt can be discharged under Chapter 13 of the Code, a scheme which allows a debtor to repay his obligations over time from his disposable income. Chapter 13 allows a debtor to "work off" his debt rather than lose everything, i.e., to reorganize rather than liquidate. See *In re Caldwell*, 895 F.2d 1123,1126(6th Cir. 1990); *In re McAloon*, 44 B.R. 831, 835(Bankr. E.D.Va. 1984).

The debtor may proceed under Chapter 13 with the Court's permission if his plan meets the six criteria identified in 11 U.S.C. Section 1325(a), and if he proposes payments which meet the requirements of 11 U.S.C. Section 1325(b). These latter requirements are that the debtor pledge all of his disposable income to repayment for at least three years and that his unsecured creditors receive at least as much under Chapter 13 of the Bankruptcy Code as they would under Chapter 7. The most important of the six criteria delineated by Section 1325(a) for purposes of this case is that the debtor propose a plan "in good faith and not by any means forbidden by law." 11 U.S.C. Section 1325(a)(3).

The legislative history accompanying the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549(1978), part of which created Chapter 13, recites that in enacting these provisions, Congress intended to

> enable an individual under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period. In some cases, the plan will call for full repayment. In others, it may offer creditors a

> percentage of their claims in full settlement....This protection relieves the debtor from indirect and direct pressures from creditors, and enables him to support himself and his dependents while repaying his creditors at the same time. The benefit to the debtor of developing a plan of repayment under chapter 13, rather than opting for liquidation under chapter 7, is that it permits the debtor to protect his assets. In a liquidation case, the debtor must surrender his nonexempt assets for liquidation and sale by the trustee. Under chapter 13, the debtor may retain his property by agreeing to repay his creditors. Chapter 13 also protects a debtor's credit standing far better than a straight bankruptcy, because he is viewed as a better risk. In addition, it satisfies many debtors' desire to avoid the stigma attached to straight bankruptcy and to retain the pride attendant on being able to meet one's obligations. The benefit to the creditors is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 118, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5963, 6077-6079. See also S. Rep. No. 989, 95th Cong., 2d Sess.141, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5799, 5927. *Accord*, Senator DeConcini's remarks during the final Senate debates on this legislation, reported at 124 Cong. Rec., S17403-4(Oct. 6, 1978).

Thus Congress did *not* contemplate that a debtor would resort to Chapter 13 as a device for paying almost nothing to settle one's unsecured debts without

incurring the disadvantages of complete liquidation under Chapter 7. That is, a Chapter 13 plan *cannot* be a disguised Chapter 7 liquidation where the unsecured creditors receive nothing at all while the debtor avoids the consequences of non-dischargeability associated with Chapter 7, keeps his good credit and retains his assets, without subverting the will of Congress. See *Temple v. United States*, 25 B.R. 285, 288(W.D. Ark. 1982).

Because the discharge of one's debts under Chapter 13 can therefore be a salvation for an honest but unfortunate debtor while, at the same time, a loophole for a dishonest one, the "good faith" requirement of 11 U.S.C. Section 1325(a)(3), takes on special meaning. The good faith, or lack of it, with which a plan is proposed under Chapter 13 distinguishes a sincere effort at repayment from a false one, i.e., a veiled Chapter 7 liquidation with none of its consequences. See *In re Girdaukas*, 92 B.R. 373, 377(Bankr. E.D.Wisc.1988).

If there is good faith, the Chapter 13 plan will generally be confirmed, discharging even those debts which are caused by the debtor's "willful and malicious injury" to another entity or the property of another entity. Yet if no good faith is found, the debtor will be relegated to his remedies under Chapter 7 and those debts resulting from the debtor's "willful and malicious" injury to another entity or the property of another entity will not be discharged under Chapter 7 of the Bankruptcy Code. 11 U.S.C. Section 523(a)(6). In *Kawaauhau v. Geiger*, 523 U.S. 57, 61(1998), this Court has held that a "willful and malicious" injury under Section 523(a)(6), results from the actor's deliberate

and intentional injuring of another or his property. See *In re Baldwin*, 245 B.R. 131, 135-136(9th Cir. BAP 2000).

In defining the dimensions of "good faith" for purposes of Section 1325(a)(3), Congress has not been silent. In the legislative history to the Bankruptcy Reform Act of 1994, one which increased the dollar limitations for plans under Chapter 13, members of both the House and the Senate indicated that a good faith assessment includes consideration of the debtor's misconduct, if any, prior to his filing of the Chapter 13 petition. Specifically, Rep. Brooks, commenting on the increased debt allowed by Chapter 13, noted that "creditors generally benefit when a debtor elects Chapter 13....[But] it is *not* contemplated that an individual *who committed [a] heinous crime* would be able in good faith to use Chapter 13 solely as a means of discharging a civil obligation owing to a harmed party." 140 Cong. Rec. H10, 765(emphasis supplied). Similarly, Senator Domenici stated for the record that

> [t]he bill's report also cautions bankruptcy judges, lawyers, and debtors that the bankruptcy laws *should not be used as an artifice to avoid civil liability for intentional misconduct.* I commend the authors of the report for including this language.

140 Cong. Rec. S14, 739(emphasis supplied).

Decisional law has also attempted to define the contours of "good faith" within the meaning of Section 1325(a)(3). Bankruptcy courts usually apply a totality of the circumstances test to determine whether a debtor

lacked good faith when filing a Chapter 13 petition. *In re Fleury*, 294 B.R. 1, 5-6(Bankr. D. Mass. 2003). Among other things, these courts look to: (1) the amount of the proposed payments and the amount of the debtor's surplus; (2) the debtor's employment history and his opportunity for increasing his income in the future; (3) the probable duration of the debtor's plan; (4) the accuracy fo the plan's description of the debtor's debts, expenses, unsecured loans etc.; (5) the extent of the preferential treatment between classes of creditors; (6) the extent to which secured claims are modified; (7) the type of debt sought to be discharged and whether any such debt is non-dischargeable under Chapter 7; (8) the existence of special circumstances such as inordinate medical expenses; (9) the frequency with which the debtor sought relief under the Bankruptcy Act; (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; and (11) the burden which the plan would place on the trustee. See, e.g., *In re Caldwell*, 895 F.2d 1126; *In re Doersam*, 849 F.2d 237, 230(6th Cir. 1988); *In re Estus*, 695 F.2d 311, 317(8th Cir. 1982); *In re Lancaster*, 280 B.R. 468, 475(Bankr. W.D. Mo. 2002).

Measured against Congress' intent in enacting Chapter 13 or the decisional law interpreting its provisions, the respondent-debtor has failed to make the requisite showing of good faith on his part in pursuing his Chapter 13 petition. First, the nature of the debt at issue is closely tied to the debtor's egregious, wanton and heinous conduct in attacking the petitioner, his wife, smashing her chin, snapping her neck and striking her repeatedly. *In re Banks*, 248 B.R. 799, 803(8th Cir. BAP 2000). Second, the respondent is a middle-aged physician with excellent earning

capacity for the future who has submitted a five-year plan under Chapter 13 which pays the petitioner, his ex-wife, *nothing* for the injuries he inflicted upon her or the inordinate medical expenses he has caused. *In re Terry*, 630 F.2d 634, 635(8th Cir. 1980). *In re Farmer*, 186 B.R. 781, 783(Bankr. D. R.I. 1995). *In re Lattimore*, 69 B.R. 622, 625(Bankr. E.D. Tenn. 1987).

Third, the respondent began this bankruptcy proceeding in Montana just two days before the arbitration of the petitioner's civil action against him in California state court seeking damages for the injuries caused by his vicious attack. Fourth, these very claims by the petitioner which he now seeks to discharge under Chapter 13 could *not* have been discharged under Chapter 7. See *Neufeld v. Freeman*, 794 F.2d 149, 152-153(4th Cir. 1986). *In re Banks*, *supra*. Fifth, the respondent's motivation and sincerity in seeking Chapter 13 relief are suspect and do not a support a finding of good faith given the timing, self-serving results and benefits which inure to him as a result.

In fact, the undeniable inference on this record is that contrary to Congress' intent that he not use the bankruptcy laws in order to avoid civil liability to another person, especially his ex-spouse, as a result of his heinous, willful and malicious acts, the respondent has done just that. Despite egregious and wanton behavior which has caused the petitioner permanent injuries from which she will never recover, the respondent has used the bankruptcy laws in order to avoid paying her anything for the injuries he has caused. He has filed a modified plan not with the intention of satisfying the petitioner's claims to the greatest extent possible but with the intention of

avoiding payment of that claim to the greatest extent possible. It is the antithesis of good faith and the mark of a dishonest debtor who does not deserve to be reinstated into the business world.

The decision below therefore subverts Congress' intent in enacting Chapter 13 of the Bankruptcy Code and the result cannot be justified by the ruling on this record that the respondent somehow prosecuted his modified plan in "good faith."

2. This Court As A Matter Of Federal Superintendence Over The Bankruptcy Courts And As A Matter Of Sound Social Policy Should Enunciate A New Rule That A Debtor Who Has Committed A Heinous Attack Upon His Spouse Causing Her Severe Personal Injuries As Well As A Lifetime Disability And Who Possesses The Capacity Eventually To Pay The State Court Judgment Rendered Against Him On Account Of His Attack, Cannot In Good Faith Pursue A Chapter 13 Plan In Bankruptcy Which Makes No Accommodation For Paying Damages To His Ex-Spouse For Her Injuries Or For The Medical Bills Which She Incurred.

The practical effect of the rulings below is that a husband-physician may willfully and maliciously batter his wife, shatter her teeth, snap her neck and render her a near invalid, then move to another jurisdiction and after suit is brought against him for his criminal and civilly liable conduct, commence a Chapter 13 plan in bankruptcy court, a plan which provides for no restitution for his ex-wife and, in fact, discharges completely the judgment she obtained against him for

his heinous conduct. This result constitutes a miscarriage of justice, is justified by neither law nor equity and violates sound social policy by permitting the respondent to shift financial responsibility for his own actions to the public at large. Ultimately, he has made the petitioner, his ex-wife, a public charge in violation of the "good faith" requirement of bankruptcy law.

This good faith requirement protects the jurisdictional integrity of the bankruptcy courts which sit in equity and therefore demand that a party seeking relief enter with clean hands. *Securities Comm'n v. U.S. Realty Co.*, 310 U.S. 434, 455(1940). *Pepper v. Litton*, 308 U.S. 295, 303-307 (1939). The cornerstone of the bankruptcy courts has always been the doing of equity. *Id.* The protections and forgiveness inherent in bankruptcy laws for the "honest but unfortunate debtor," see *Grogan v. Garner*, 498 U.S. 279, 286-287(1991) quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244(1934); *Hanover National Bank v. Moyses*, 186 U.S. 181, 192(1902), have no application when a party is attempting through fraud or some other artifice to circumvent a legal obligation through a technicality of the law. *Cohen v. De La Cruz*, 523 U.S. 213, 217-218(1998). On those occasions when the dishonest debtor is uncovered, it is the duty of the bankruptcy court in the exercise of its equity jurisdiction to "undo" the wrong, refuse confirmation of the Chapter 13 plan and leave the debtor to the remedy of bankruptcy by liquidation under Chapter 7. *Securities Comm'n v. U.S. Realty Co.*, 310 U.S. at 457. *Pepper v. Litton*, 308 U.S.

at 312. In this way, the good faith requirement guards against jurisdictional abuse as well as the misuse and manipulation of bankruptcy remedies.

This good faith requirement under the bankruptcy law, however, has come to mean different things to different courts. There are many reported decisions among the circuits confirming Chapter 13 plans paying less than 100 percent of claims that are or might be nondischargeable under Chapter 7; and at least as many decisions refuse to confirm plans which compromise claims which are or might be nondischargeable under Chapter 7. Even within one circuit, it appears that the kind of nondischargeable claim involved will make a difference in assessing good faith. See, e.g., *In re Wilcox*, 251 B.R. 59, 67(Bankr. E.D. Ark. 2000). Moreover, some courts have approached but not adopted a per se rule against confirmation of a Chapter 13 plan that pays less than 100% of a claim arising from pre-petition criminal conduct. See, e.g., *In re. Sitarz*, 150 B.R. 710, 722-725 (Bankr. D. Minn. 1993).

Given this disparate decisionmaking in the several circuits concerning the dimensions of good faith in filing a Chapter 13 bankruptcy plan, this Court as a matter of federal superintendence and sound social policy should enunciate a new rule that a debtor who has committed a heinous attack upon his spouse causing her severe personal injuries as well as a lifetime disability and who possesses the capacity eventually to pay the state court judgment rendered

against him on account of his attack, cannot in good faith pursue a Chapter 13 plan in bankruptcy which makes no accommodation for paying damages to his ex-spouse for her injuries as well as for the medical bills she incurred.

3. The Decision Below Violates "Fundamental Law" By Denying The Petitioner Due Process And The Equal Protection Of The Laws.

In *Hanover National Bank v. Moyses*, 186 U.S. at 192, this Court held that "Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law...." *Id.* If the provisions of Chapter 13 together with the "good faith" requirement of 11 U.S.C. Section 1325(a)(3), are construed to allow a debtor such as the respondent in these circumstances to obtain a discharge of his debts, including those owed the petitioner under the California civil judgment of $1.28 million, then those provisions are "so grossly unreasonable as to be incompatible with fundamental law" and should be declared unconstitutional either on their face or as applied to the petitioner, denying her due process and the equal protection of the laws.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit and, ultimately, to vacate this judgment and remand the matter to the bankruptcy court for the District of Montana with instructions that it reverse and vacate its

ruling that the petitioner's claims founded upon the state court judgment for the respondent's willful and malicious conduct be discharged, reinstating the petitioner's state court judgment against the respondent in its entirety; or provide the petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,
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(any footnotes trail end of each document)

No. 04-35713

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACQUELINE ALLEN,
Plaintiff - Appellant,

v.

CHRISTOPHER LYNN ALLEN,
Defendant - Appellee.

January 12, 2006, Argued and Submitted, Portland, Oregon

January 19, 2006, Filed

NOTICE: RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For JACQUELINE ALLEN, Plaintiff - Appellant: Cliff Casey, Palm Springs, CA.

For CHRISTOPHER LYNN ALLEN, Defendant - Appellee: James A. Patten, Esq., PATTEN, PETERMAN, BEKKEDAHL & GREEN, Billings, MT.

JUDGES: Before: O'SCANNLAIN, KLEINFELD, and GRABER, Circuit Judges.

OPINION: MEMORANDUM*

Before: O'SCANNLAIN, KLEINFELD, and GRABER, Circuit Judges.

Appellant Jacqueline Allen appeals the district court's order upholding the bankruptcy court's decision that her tort judgment against debtor-defendant Christopher Allen is dischargeable under Chapter [*2] 13. On de novo review, Dawson v. Wash. Mut. Bank. F.A. (In re Dawson), 390 F.3d 1139, 1145 (9th Cir. 2004), cert. denied, 126 S. Ct. 397, 163 L. Ed. 2d 275 (2005), we affirm.

The applicable version of 11 U.S.C. § 1328(a), providing for discharge of debts, made no exception for debts related to willful and malicious injury caused by the debtor. Such debts are dischargeable in Chapter 13 bankruptcy. Graves v. Myrvang (In re Myrvang), 232 F.3d 1116, 1122 (9th Cir. 2000).

Whether the debtor's plan was proposed in good faith, despite making no provision for payment of the tort judgment that post-dated our earlier decision in this case, 23 Fed. Appx. 859 (9th Cir. 2002), is a more difficult question. However, the issue of good faith was not timely and properly brought to the bankruptcy court's attention. Under 11 U.S.C. § 1329(a), the holder of an unsecured claim may seek to have the debtor's Chapter 13 plan modified "at any time after confirmation of the plan but before the completion of payments under such plan." The plan was confirmed in 1999. Plaintiff never sought modification of the plan. Her tort claim was reduced to judgment in 2002, but the bankruptcy court did not learn of the judgment until it asked for a status report in January 2004. The debtor completed payments under his plan in March

2004. In the circumstances, we have no opportunity to revisit the validity of the plan.

AFFIRMED.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Filed 7/8/2004
CV 04-35

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

JACQUELINE ALLEN,
Creditor and Appellant,

v.

CHRISTOPHER LYNN ALLEN,
Debtor and Appellee.

ORDER

ISSUE ON APPEAL

The sole issue on appeal before this Court is whether the Bankruptcy Court erred when it ordered that Appellant Jacqueline Allen's assault and battery claim against Appellee Christopher Allen was dischargeable under 11 U.S.C. § 1328.

BACKGROUND

Appellant Jacqueline Allen and appellee Christopher Allen were married for 17 years, living mostly, in California. Christopher was an emergency room physician at Desert Regional Medical Center in Palm Springs, California, Jacqueline was employed as Christopher's business manager, bookkeeper, and office staff.

On April 13, 1996, Christopher was arrested for DUI after crashing his SUV. Upon his release from jail, Christopher returned home and demanded from Jacqueline the keys to the parties' second car. When Jacqueline refused, Christopher assaulted her about the head, face cheeks, and neck. As a result of the assault, Jacqueline continues to suffer from extensive injuries including temporal mandibular joint disorder, and claims almost $40,000 in medical bills to date.

In April of 1997, Jacqueline filed suit against Christopher based on the April 13, 1996 assault in California Superior Court (Cause No. INC 001476). In 1998, Jacqueline and Christopher formally divorced.

On February 24, 1999, Christopher filed a Chapter 13 Petition in the U.S. Bankruptcy Court, District of Montana (BP#99-10412-JLP). Subsequently, Jacqueline obtained relief from stay in order to continue with her California civil claim. On March 16,1999, Christopher filed his initial Chapter 13 Plan. After objection by the Trustee, Christopher filed a modified Plan on August 3, 1999. Because Christopher's plan failed to make any allowance for or provide any compensation to Jacqueline for her pending personal injury claim, Jacqueline objected to it. On November 4, 1999, a confirmation hearing was held on Christopher's proposed Chapter 13 Plan. On December 6, 1999, the Bankruptcy Court issued its order confirming the Chapter 13 Plan.

On December 16, 1999, Jacqueline appealed the confirmation of the Plan to the United States District Court for Montana. In May of 2000, the District Court affirmed the Bankruptcy Court's confirmation of the

Plan. On January 11, 2002, the Ninth Circuit Court of Appeals similarly affirmed the confirmation of the Plan. On March 12, 2002, judgment was entered in favor of Jacqueline in her California civil assault trial in excess of $1.28 million. Despite the reduction of the claim to judgment, Jacqueline never filed a motion for modification of the Plan.

On January 8, 2004, the Bankruptcy Court requested a status report on Christopher's performance under the Plan. On March 17, 2004, the Chapter 13 Trustee provided the Bankruptcy Court with notice that Christopher had completed his payments under the Plan. On March 8, 2004, the Bankruptcy Court held a hearing regarding whether Jacqueline's civil judgment was dischargeable under Chapter 13. On March 10, 2004, the Bankruptcy Court issued an order determining that Jacqueline's claim, although constituting a willful and malicious injury, was nevertheless dischargeable under the Bankruptcy Code. Jacqueline now appeals the order of the Bankruptcy Court.

STANDARD 0F REVIEW

The Bankruptcy Court's findings of fact are reviewed under the clearly erroneous standard. Fed. R. Bankr. P. 8013., Its conclusions of law are reviewed de novo. O'Malley Lumber Co. v. Lockhard, 884 F.2d 1171, 1174 (9th Cir.1989).

ANALYSIS

As an initial matter, it is important to again note that the sole issue on appeal at this time is "whether the

Bankruptcy Court erred when it ordered that Appellant Jacqueline Allen's assault and battery claim against Appellee Christopher Allen was dischargeable under 11 U.S.C. § 1328." Thus, despite Jacqueline's attempts to the contrary, this Court will not revisit the issue of whether or not Christopher's Chapter 13 Plan was improperly confirmed as this issue has been previously resolved.[1]

11 U.S.C. § 1328 provides that upon completion of a Chapter 13 plan the court shall grant a debtor a discharge of all debts provided for by the plan except the kind specified in § 523 (a)(5)(8), or (9). Section 523(a)(5) denies discharge for child support or alimony; Subsection (8) denies discharge for student loans; and Subsection (9) denies discharge for death or personal injury caused by the debtor's operation of a motor vehicle while intoxicated.

Omitted from the list of nondischargable items in a Chapter 13 case is Section 523 (a) (6), which denies discharge in a Chapter 7 case for willful and malicious injury by the debtor to another entity or the property of another entity. Courts have repeatedly upheld Congress's decision to prohibit the discharge of willful and malicious injury claims in Chapter 7 cases-wlule allowing their discharge in Chapter 13 case. For example, in In r LeMaire, 898 F.24 1346) 1348 (8th Cir.1990), the court held that "a debt which falls within the scope of section 523(a)(6) [e.g., a willful and malicious injury claim].. . which may not be discharged under Chapter 7, may nevertheless be discharged if the debtor meets the requirements of Chapter 13." The Tenth Circuit reached a similar conclusion in In re

Caldwell, 895 F.2d 1123 (10th Cir. 1990) when it stated:

We began with the proposition that a debt which follows a `willful and malicious injury' cannot be discharged under Chapter 7 of the Bankruptcy Code. But such a debt can be discharged under Chapter 13, which allows the debtor to repay his obligation over time from his disposable income.

895 F.2d at 1126 (citations omitted).

The Court agrees with the LeMaire and Caldwell courts that a plain reading of the Bankruptcy Code reveals that willful and malicious injury claims, while not dischargeable under Chapter 7, may be discharged under Chapter 13. In the Bankruptcy Court's March 10, 2004, it concluded as factual finding that Jacqueline's California judgment was "the result of [Christopher's] willful and malicious injury." Despite this finding, the Bankruptcy Court, citing In re LaMaire, concluded that Jacqueline's claim was dischargeable under 11 U.S.C. 1328. The Court agrees and finds that the Bankruptcy Court's conclusion was well grounded in law. Accordingly, IT IS HEREBY ORDERED that the instant appeal is DISMISSED and the judgment of the Bankruptcy Court is AFFIRMED.

The Clerk is directed to notify the parties of the making of this Order.

RICHARD F. CEBULL
U. S. DISTRICT JUDGE

Footnote(s)

fn1 As noted abovc, the Bankruptcy Court, U.S. District Court, and Ninth Circuit Court of Appeals all reviewed the Chapter 13 Plan and agreed that it should be confirmed. The only event which has occurred since the review of the Plan is that Jacqueline's civil suit has been reduced to judgment. Once judgment was entered, Jacqueline could have moved to modify the Plan pursuant to l 1 U.S.C. § 1329. However, Jacqueline failed to do so. Thus, this Court has no basis for revisiting the confirmation of the Plan, even given the fact that Jacqueline's civil suit has been reduced to judgment since the Plan was confirmed.

Filed 3/10/2004
Case No. 99-10412-13
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re:

CHRISTOPHER LYNN ALLEN,
Debtor.

JACQUELINE ALLEN,
Plaintiff,

v.

CHRISTOPHER LYNN ALLEN,
Defendant.

ORDER

At Butte in said District this 10th day of March, 2004.

On March 8, 2004, after due notice, the Court held the hearing on the plaintiff's complaint seeking a judgment finding that plaintiffs claim against the defendant/debtor was nondischargeable under the Bankruptcy Code. The Court set this matter for hearing by Order entered February 6, 2004. The Clerk mailed a copy of the order to "Jacqueline Allen, 53-122 Juarez Road, La Quinta, CA 92253." This was the address supplied by the plaintiff in her status report to the Court filed January 30, 2004. The mail was returned to the Clerk's office on February 23, 2004, as "Addressee Unknown and no mail receptical". The

Clerk then called the plaintiff at her home phone, as the plaintiff is appearing in this proceeding pro se, and then sent a Fed Ex mailing to her at 73-700 Highway 111, ste 2, Palm Desert, CA 92260. The plaintiff returned the Clerk's call about the mailing and stated she had the wrong address in her status report to the Court. The Clerk then faxed a copy of the Order to the plaintiff and mailed a copy to 5312 Avenita, Juarez, CA 92253.

On the date of the hearing, the plaintiff faced to the Court "Plaintiff Jacqueline Allen's motion to appear by this Declaration and/or for Continuance of Adversary Hearing to Hire Local Counsel or to Have my California Attorney Admitted Pro Hac Vice." The motion related in part, as to the mailing matter, that plaintiff did not receive timely notice as both the Court and Mr. Patten, counsel for the defendant, have my address completely wrong" (even though it was correctly stated on my previous (Mr. Fryer's) "motion to withdraw and has been used on my previous papers. "For instance, the proof of service on Mr. Patten's papers has my address as: Jacqueline Allen, 5312 Avenita, Jaurex, CA 92253, When, in fact, my CORRECT address is: Jacqueline Allen, 53-120 Avenida Juarez, La Quinta, CA 92253. The Court notes that the stipulation dated August 2, 2001, substituting the plaintiff as pro se for her counsel of record, recites plaintiff's address as Jacqueline Allen, 53120 Juarez Road, La Quanta, California 92253, which is precisely where the Clerk's mailing was sent, as such was the last address posted on the plaintiff's status report. Obviously, plaintiffs own conduct caused a faulty mailing.

Nevertheless, the Court granted the plaintiff's motion to submit her testimony by declaration as she did not attend the hearing on March 8, 2004, even though she had notice thereof in time for her to do so. She also submitted a witness list, listed her only witness as herself, and an exhibit list listing Plaintiff's Exhibit 1- "Judgment against Defendant in the case Allen v. Allen, California Riverside County/Indio Superior Court, Case No. INC 001476". (That document was filed March 4, 2004, and was dated March 2, 2004, well in advance of trial). The defendant's witness list listed the defendant, 10895 Bullock Court, Parker, CO 80134 as the only witness and defendant's Exhibit List also lists the same California Judgment listed by the plaintiff. The defendant appeared at the hearing in person, represented by counsel James A. Patten.

Since the Court, on the merits, accepted the plaintiff s declaration over objection of defendant's counsel, the court sets out the declaration in full as follows:

7. If the Court will not continue these proceedings, then I respectfully request that the Court accept this Declaration as my appearance in this hearing and I submit on my papers, pleadings and Exhibit "1" the California Judgment against the Debtor for his assault & battery against me. The elements of the debtor's assault & battery, and my injuries and damages, have already been proven against the Debtor as borne out by the Judgment after extensive litigation.

8. As a result of the willful and malicious assault and battery by the Debtor against my person, I have been injured and disabled for life (including severe emotional distress, and constant severe pain from my TMJ and

snapped neck injuries), all of which have virtually destroyed any quality of life for me. The California Judge, Honorable Douglas P. Miller, has so found when he carefully, and deliberately, considered all of the evidence over a six-month time frame before he rendered his Judgment (Exhibit "1 "). I now respectfully request that this Court give great care and weight to the Judgment in making its determinations in this case.

9. It is my position and assertion that the Debtor is not entitled to a "discharge" of my assault & battery Judgment against him under the US Bankruptcy. Code and I respectfully request that the Court read and consider my Adversary Complaint, as well as the papers, pleadings and especially Exhibit "l" the California Judgment and that by doing so, the Court would deny Debtor a "discharge" of my assault & battery Judgment against him.

The exhibits submitted by both parties was admitted into evidence, is marked Exhibit "1 " and attached to this Order and by reference made a part hereof.

The defendant introduced no evidence, except for counsel's contention that the assault never took place as alleged by the plaintiff. However, that contention is rejected as the Judgment of the California Court, while containing no findings of facts, notes the First Cause of action was "Assault & Battery (Intentional Tort)". It is clear from the Judgment and the Declaration of the plaintiff that the plaintiff's claim of $1,289,036.70 is based on the assault and battery of the defendant.

The defendant's chapter 13 plan will be completed with the March, 2004, payment and he will thus be entitled to a discharge under 11 U.S.C. § 1328, which provides in pertinent part:

(1) As soon as practicable after completion by the debtor of all payments under the plan, . . ., the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt -

(2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title; The plaintiff's complaint seeks a non-dischargeability judgment under 11 U.S.C. § 523(a)(6) "for willful and malicious injury by the debtor to another entity or to the property of another entity". The injury itself must be deliberate or intentional, "not merely a deliberate or intentional act that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57, 61-62,118 S.Ct. 974, 977, 140 L.Ed.2d 90 (1998). In re Bailey, 197 F.3d 997, 1000 (9' Cir.1999); see also In re Baldwin, 245 B.R. 131, 135-36 (9`h Cir. BAP 2000); In re Branam, 226 B.R. 45, 52 (9th Cir. BAP 1998), aff'd, 205 F.3d 1350 (9`h Cir. 1999); In re Munson, 18 Mont. B.R. 378, 382 n.2 (Bankr. Mont. 2000); In re Kidd, 219 B.R. 278, 284,16 Mont. B.R. 382, 390 (Bankr. Mont. 1998).

The Ninth Circuit held in Petralia v. Jercich ("Jercich"), 238 F.3d 1202, 1208 (9th Cir.), cert. denied, 533 U.S. 930,121 S.Ct. 2552, 150 L.Ed.2d 718 (2001), that § 523(a)(6)'s willful injury requirement is met "when it is shown either that the debtor had a subjective motive to inflict the injury or that the debtor believed that injury was substantially certain to occur as a result of his conduct." In re Su ("Su"), 290 F.3d 1140, 1142 (9th Cir.

2002); Kidd, 219 B.R. at 285,16 Mont. B.R. at 392. Quoting Su, the BAP held: "The subjective standard correctly focuses on the debtor's state of mind and precludes application of §523(a)(6)'s nondischargeability provisions short of the debtor's actual knowledge that harm to the creditor was substantially certain." In re Peck, 295 B.R. 353, 364-65 (9th Cir. BAP 2003), quoting Su, 290 F.3d at 1146.

In Dean v. Dean, 14 Mont. B.R. 154,158-60 (Bankr. D. Mont. 1995) this Court, citing In re Johnson, 109 B.R. 885, 891-92 (Bankr. N.D. Ind. 1989) (citing cases), held that an assault and battery is a willful and malicious injury within the definition of § 523(a)(6). I therefore conclude the plaintiff has proven by a preponderance of the evidence that the damages she sustained as reflected by the California Judgment were the result of the defendant's willful and malicious injury within the definition of § 523(a)(6).

Nevertheless, the above notwithstanding, the critical issue to this case is whether the plaintiff is entitled to a judgment finding her claim is non-dischargeable in a chapter 13 case under § 1328(a)(2). The clear language of that subsection provides that debt incurred under § 523(a)(6) is not excepted from discharge as are debts under § 523(a)(5) (alimony or spousal support), (a)(8) (student loans), or (a)(9) (injury arising from operation of a vehicle while under the influence of alcohol or drugs).

The case of Handeen v. LeMaire (In re LeMaire), 898 F.2d 1346, 1348 (8th Cir.1990) holds:

Handeen vigorously argues that, as a matter of law, his civil judgment cannot be discharged because it arose from a criminal act. The panel rejected this argument and we do likewise.

Handeen's argument is based upon 11 U.S.C. § 523(a)(6) (1988), which provides that a debt arising from infliction of "willful and malicious injury by the debtor to another entity" may not be discharged under specified sections of the Bankruptcy Code. As the panel observed, there is no question that LeMaire's assault inflicted a "willful and malicious" injury upon Handeen. 883 F.2d at 1376. Handeen's reliance upon section 523(a)(6) is unavailing, however, because LeMaire filed his petition under Chapter 13, which does not include section 523(a)(6) in its list of nondischargeable debts. See, l l U.S.C. § 1328(a) (1988). Although section 523(a)(6) does by its express statutory terms apply to a petition for bankruptcy under Chapter 7, its applicability does not extend to a filing under Chapter 13. Therefore, a debt which falls within the scope of section 523(a)(6), such as the debt owed to Handeen, which may not be discharged under Chapter 7, may nevertheless be discharged if the debtor meets the requirements of Chapter 13.

Thus, the judgment debt of the plaintiff (Exhibit "1 ") is subject to the Chapter 13 discharge to be issued to this Chapter 13 Debtor upon completion of the plan payments this month.

IT IS ORDERED the complaint of the plaintiff Jacqueline Allen seeking a judgment that her state court judgment based upon the assault and battery by the defendant debtor is nondischargeable under 11

U.S.C. § 1328, is dismissed with prejudice, and judgment shall be entered for the defendant that the Judgment of the California state court (Exhibit "1") is subject to the order of discharge entered in this Chapter 13 case.

BY THE COURT
HON JOHN L. PETERSON Senior Bankruptcy Judge
United States Bankruptcy Court District of Montana

Filed 3/16/2006
No. 04-35713

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACQUELINE ALLEN,
Plaintiff - Appellant,

v.

CHRISTOPHER LYNN ALLEN,
Defendant - Appellee.

ORDER

Before: O'SCANNLAIN, KLEINFELD, and GRABER, Circuit Judges.

The panel has voted to deny the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

(2)

No. 05-1600

FILED
AUG 14 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JACQUELINE ALLEN,

Petitioner,

v.

CHRISTOPHER ALLEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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August 14, 2006

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QUESTION PRESENTED

Whether the Ninth Circuit erred by holding that a claim for an assault and battery is dischargeable in a Chapter 13 bankruptcy when §1328(a) of the Bankruptcy Code requires the bankruptcy courts to grant discharge of all debts including claims for willful and malicious injury.

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I.

COUNTER-STATEMENT OF THE CASE

In 1999, Christopher Allen ("respondent") filed a Chapter 13 bankruptcy. Pet. App. 5a. Before filing, his ex-wife, Jacqueline Allen, ("petitioner") had sued him for personal injuries resulting from an assault and battery. *Id.* Also at the time of filing, the Internal Revenue Service was engaged in collection activities for unpaid income tax liabilities. The Chapter 13 plan proposed to pay respondent's income tax liability in full, a spousal maintenance and support obligation to petitioner in full, with a small balance paid to general unsecured claims including the assault and battery claim of the petitioner.

In December 1999, respondent's Chapter 13 plan was confirmed over the objection of the petitioner. *In re Allen*, 241 B.R. 710 (Bankr. D. Mont. 1999). The bankruptcy court concluded that the plan was proposed in good faith because respondent was working in his profession and providing substantial spousal maintenance to petitioner as part of his plan; all of respondent's projected disposable income based on his present employment was committed to the plan; the respondent was seeking to repay a substantial tax claim and wishing to avoid the future litigation expense of petitioner because she had not accepted the divorce decree in California and she was seeking "more litigation to continue that acrimonious fight." *Id.* The bankruptcy court found that substantial payments were being made under the plan, mostly to the benefit of the IRS and one other unsecured priority creditor, petitioner's divorce counsel. *Id.* The Ninth Circuit Court of Appeals affirmed on January 11, 2002. *Allen v. Allen*, 23 Fed. Appx. 859 (9th Cir. 2002). The Ninth Circuit held the bankruptcy court's finding of good faith was not clearly erroneous:

> Finally, Jacqueline asserts that Christopher's abusive conduct toward her evinces his bad faith in proposing the Plan. As noted above, however, there has been no judicial determination with respect to Jacqueline's personal injury claim. Good faith is determined on the basis of the totality of the circumstances. *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386, 1390-91 (9th Cir. 1982). The bankruptcy court found that Christopher proposed his Plan in good faith because Christopher committed all of his projected disposable income to the Plan, sought to repay substantial tax claims, and sought to avoid litigation expense. The bankruptcy court's finding of good faith was not clearly erroneous.

Allen, 23 Fed. Appx. at 860-861.

Before the respondent's plan was confirmed, the petitioner had filed two adversary complaints in the bankruptcy court: one, objecting to the respondent's discharge of petitioner's assault and battery claim; and the second requesting a liquidation of her assault and battery claims. The bankruptcy court referred the liquidation of petitioner's assault and battery claim to the United States District Court for the Central District of California in accordance with 28 U.S.C. §157(b)(5) (which in turn referred it to California State Court); it stayed further action on the petitioner's objection to discharge; and it considered confirmation of the respondent's proposed Chapter 13 plan.

In March 2002, petitioner obtained a default judgment against respondent in the State of California Superior Court for $1,289,036. Despite the liquidation of her claim, petitioner did not notify the bankruptcy court of the claim. Two years later, as respondent was near completion of his

Chapter 13 plan, the bankruptcy court requested a status report on the liquidation of petitioner's claim and scheduled a trial on the petitioner's objection to discharge which had previously been stayed. For the first time, petitioner advised the bankruptcy court of the California state court judgment. At the trial on the objection to discharge claim, the bankruptcy court determined that the petitioner's assault and battery claim was dischargeable under 11 U.S.C. §1328(a).

Petitioner did not seek modification of respondent's Chapter 13 plan under 11 U.S.C. §1129(a) after the liquidation of her claim, nor did she seek further relief based upon her current allegations that respondent lacked good faith. Rather, petitioner proceeded only in her objection to discharge the adversary proceeding and appealed the bankruptcy court judgment of discharge which was affirmed by the Ninth Circuit. *Allen v. Allen*, 163 Fed. Appx. 598 (9th Cir. 2006). She now seeks a Writ of Certiorari of that affirmance.

Although petitioner seeks review of the judgment of dischargeability, she argues that confirmation of the respondent's Chapter 13 plan was in error because respondent lacked good faith. These arguments are waived, however, because petitioner never raised the issue of good faith after her assault and battery claim was liquidated and she never requested the bankruptcy court to revisit its good faith determination in light of her liquidated claim. Both the district court and the Ninth Circuit recognized the good faith issue was not timely nor properly brought to the bankruptcy court's attention. The district court stated:

> As noted above, the Bankruptcy Court, U.S. District Court, and the Ninth Circuit Court of Appeals all reviewed the Chapter 13 Plan and

> agreed that it should be confirmed. The only event which has occurred since the review of the Plan is that Jacqueline's civil suit has been reduced to judgment. Once judgment was entered, Jacqueline could have moved to modify the Plan pursuant to 11 U.S.C. §1329. However, Jacqueline failed to do so. Thus, this Court has no basis for revisiting the confirmation of the Plan, even given the fact that Jacqueline's civil suit has been reduced to judgment since the Plan was confirmed.

Allen v. Allen, ftnt. 1 (04-35); Pet. App. 9a.

The Ninth Circuit agreed:

> However, the issue of good faith was not timely and properly brought to the bankruptcy court's attention.

Allen v. Allen, 163 Fed. Appx. 598 (9th Cir. 2006).

II.

STATUTORY BACKGROUND

Before enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, P.L. 109-8, 119 Stat. 23, a Chapter 13 bankruptcy debtor completing a confirmed Chapter 13 plan was entitled to a "super discharge" discharging, among other things, claims based upon willful and malicious injuries, such as the assault and battery claims of the petitioner. 11 U.S.C. §§1328(a), 523(a)(6).[1] Although a "willful and malicious injury by the

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[1] The Bankruptcy Abuse Prevention and Consumer Protection Act added a new exception to the §1328(a) discharge:

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debtor to another entity" may not be discharged under Chapter 7, it was formerly discharged if the debtor met the requirements under Chapter 13. *See* 11 U.S.C. §1328(a).

To obtain a super discharge, a Chapter 13 debtor must first obtain confirmation of a Chapter 13 plan and then must complete the payments under that plan. 11 U.S.C. §1328(a). One of the statutory criteria for confirmation of a proposed Chapter 13 plan is that it must be proposed "in good faith." 11 U.S.C. §1325(a)(3).

Congress has the constitutional authority to enact bankruptcy laws. Constitution, Art. I, §8, Cl.4. When it does so, the affect on property rights is generally prospective only; that is, if the bankruptcy law eliminates a property right it will do so only to those property rights otherwise arising after enactment of the bankruptcy law. *United States v. Security Industrial Bank et al.*, 459 U.S. 70, 81 (1982).[2] The substantive powers of Congress are subject to the Fifth Amendment; under its bankruptcy powers Congress is not prohibited from impairing the obligations of contracts. An equitable adjustment of creditor's claims by way of reorganization may be regulated by bankruptcy law if the statute is "consonant with a fair, reasonable, and equitable distribution of those assets." *Kurhner v. Irving Trust Co.*, 299 U.S. 445, 452 (1937).

"(4) for restitution, or damages awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to the individual or the death of an individual."

P.L. 109-8 §314(b).

[2] Here, petitioner's claim arose in 1996 well after the enactment of the Bankruptcy Code in 1978.

Congress, in accordance with its bankruptcy power, enacted bankruptcy laws allowing a discharge of personal injury claims, along with nearly all other liabilities, in a Chapter 13 case. This Court has already upheld the Chapter 13 super discharge scheme. *Pennsylvania Dept. Public Welfare v. Davenport*, 495 U.S. 522 (1990).

In *Davenport*, the petitioner challenged a Chapter 13 discharge of a criminal restitution order. This Court adhered to the Congressional policy choice to allow a discharge of restitution order, citing 5 Colliers on Bankruptcy p. 1328.01[1][e] (15th Ed. 1986):

> [T]he dischargeability of debts in Chapter 13 that are not dischargeable in Chapter 7 represents a policy judgment that [it] is preferable to debtors to attempt to pay such debts to the best of their abilities over three years rather than for those debtors to have those debts hanging over their heads indefinitely, perhaps for the rest of their lives.

Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. *supra* at 563. This Court found Congress clearly intended to limit exceptions to discharge in Chapter 13 cases. *Id.*

III.

REASONS FOR DENYING THE PETITION

A. The Circuits Are Not Divided as to the Dischargeability of a Assault and Battery Claim in a Chapter 13 Case.

The interplay between the former Bankruptcy Code §1328(a) and §523(a)(6) makes it clear that claims arising from willful and malicious injuries were dischargeable in Chapter 13 bankruptcies. All of the courts of appeal that

have considered the issue have uniformly held that a claim, such as asserted by petitioner, is dischargeable through §1328(a). *In re Coldwell,* 895 F.2d 1123 (6th Cir. 1990); *Mason v. Young (In re Young)*, 237 F.3d 1168 (10th Cir. 2001); *Massa v. Addona (In re Massa*), 187 F.3d 292 (2nd Cir. 1995); *Solomon v. Solomon (In re Solomon)*, 67 F.3d 1128 (4th Cir. 1995); *Handeen v. LeMaire (In re LeMaire*), 898 F.2d 1346 (8th Cir. 1990); *In re Rasmussen,* 888 F.2d 703 (10th Cir. 1989). The Second, Fourth, Sixth, Eighth, Ninth, and Tenth Circuit courts of appeal all agree that the Chapter 13 super discharge includes claims arising from willful and malicious injuries. All circuit courts of appeal that have considered the dischargeability of a claim arising from a willful and malicious injury, including an assault and battery claim, have held that such claims are subject to the Chapter 13 super discharge. No court of appeals has ruled otherwise.

B. Petitioner Has Waived Any Argument Relating to a Determination of Good Faith.

In her brief, petitioner argues that respondent did not prosecute his modified chapter 13 plan in "good faith," an argument she failed to raise after her claim was liquidated. Pet. Br. 12. Under the doctrine of waiver, however, petitioner cannot assert an argument in this Court that she failed to raise previously. *See, e.g., Cooper Indus. v. Avaiall Servs. Inc.*, 543 U.S. 157, 168-69 (2004) ("We ordinarily do not decide in the first instance issues not decided below."); *Spretsma v. Mercury Manne*, 537 U.S. 51, 56 n. 4 (2002) ("Because this argument was not raised below, it is waived."); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) ("We decline to address this argument

because respondent failed to address it below. . . ."); *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984).

In this case, Petitioner waived her "good faith" arguments because she did not raise that issue after her claim had been liquidated; she did not return to the bankruptcy court requesting relief from the Chapter 13 plan confirmation based upon respondent's lack of good faith. Petitioner could have requested the Chapter 13 plan be modified or dismissed in light of her liquidated claim; she did not. Consequently, there is no ruling from the bankruptcy court regarding respondent's good faith in light of the liquidated claim and there is no evidentiary record by which the bankruptcy court's good faith determination – which it did not revisit because it was not requested to – can be evaluated.

Here, petitioner is asking this Court to either determine that the bankruptcy court committed clear error, although it was not requested to reconsider its good faith determination, or to adopt a rule in the utter absence of any evidentiary background. The respondent's good faith is not a consideration in the issue framed in the adversary complaint from which this case flows. Good faith is a confirmation issue and has nothing to do with the adversary judgment in this case.

Even if this Court decides to hear this issue for the first time on appeal, it should consider the three primary factors in allowing issues to be raised for the first time in this Court: (1) whether there is a material change in the law; (2) whether assertion of the issue would have been futile; and (3) whether an important public interest is served by allowing consideration of the issue. *Standard Industries, Inc. v. Tigett Industries, Inc.*, 397 U.S. 586, 587-88 (1970)

(per curiam). In this case, there has been no material change in the law respecting the good faith of a Chapter 13 debtor; there is no contention that presenting this issue to the bankruptcy court would have been futile nor is there any important public interest served by consideration of this issue because the Bankruptcy Code has been amended.

C. Even If Petitioner Had Raised the Good Faith Issue, There Is No Split Among the Circuits in the Determination of Good Faith.

The Bankruptcy Code expressly requires a finding of the debtor's good faith in proposing a Chapter 13 plan. 11 U.S.C. §1325(a)(3). The courts of appeal are uniform in holding that the good faith determination is made by consideration of a variety of the circumstances. Although articulated differently, the courts of appeal adhere to a common analysis of good faith. The Eighth Circuit looks at the "totality of the circumstances" aided by consideration of eleven factors: (1) amount of the payment; (2) debtor's employment history; (3) the duration of the plan; (4) accuracy of the debtor's schedules; (5) extent of preferential treatment between classes; (6) extent of modification of secured claims; (7) type of debt and dischargeability of debt; (8) special circumstances; (9) frequency of bankruptcy filings; (10) motivation and sincerity of debtor; and (11) burden of administration on trustees. *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d *supra* at 1348-49.

The Tenth Circuit has adopted essentially the same factors. *Robinson v. Tenants (In re Robinson)*, 987 F.2d 665, 668 n. 6 (10th Cir. 1993).

Nearly identical factors are adopted in the Sixth Circuit Court of Appeals, *Society National Bank v. Barrett (In re Barrett)*, 964 F.2d 588, 592 (6th Cir. 1982) ("(1) the debtor's income; (2) the debtor's living expenses (3) the debtor's attorney fees; (4) the expected duration of the Chapter 13 plan; (5) the sincerity with which the debtor has petitioned for relief under Chapter 13; (6) the debtor's potential for future earnings; (7) any special circumstances the debtor may be subject to, such as usually high medical expenses; (8) the frequency with which the debtor has sought relief before in bankruptcy; (9) the circumstances under which the debt was incurred; (10) the amount of burden which administration would place on the trustee; and (12) the statutorily-mandated policy that bankruptcy provisions be construed liberally in favor of the debtor.")

The Ninth Circuit uses a case by case analysis considering whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed a plan in a inequitable manner. *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386, 1390 (9th Cir. 1982).

Although the circuits do not articulate precisely the same factors, there is commonality among the factors applied by all of them. There is no split among the circuits as to whether the dischargeability of a debt is, or is not, a factor to be considered. While the Ninth Circuit has not expressly identified dischargeability as a factor, it falls within the ambit of "unfair manipulation of the Bankruptcy Code." In fact, the bankruptcy court here expressly considered the dischargeability of the petitioner's claim as a factor in its good faith analysis. *In re Allen*, 241 B.R. *supra* at 717.

No courts of appeal have ruled that the dischargeability of a debt is not a factor; indeed all of the good faith analyses announced by the courts of appeal appear consistent on this issue. There is no split among the circuits on the good faith analysis.

D. This Case Does Not Raise an Issue of Continuing Significance.

The super discharge formerly provided by Chapter 13 was eliminated through the Bankruptcy Abuse Prevention Consumer Protection Act of 2005. That act effected amendments to §1328 of the Bankruptcy Code such that after the effective date of that act, October 17, 2005, P.L. 109-8 §1501, claims for willful and malicious injury are no longer discharged in Chapter 13. *Id.* at §314(b); *See* 11 U.S.C. §1328(a)(4). The issue raised by petitioner will have no effect on bankruptcy cases filed after October 17, 2005.

E. Petitioner Seeks Relief Contrary to the Express Will of Congress.

Petitioner argues that this Court should adopt a new rule contrary to statute. She asks this Court to hold that the good faith requirement of §1325(a)(3) of the Bankruptcy Code can never be met when the result will discharge a willful and malicious injury claim. Petitioner argues that this Court "as a matter of sound social policy" should adopt a uniform nationwide standard that is contrary to the plain language of the Bankruptcy Code. Pet. Br. 20.

This Court is unwilling to "soften the impact of Congress' chosen words even if [the Court believes] the words lead to a harsh outcome . . . " *Lamie v. United States*

Trustee, 240 U. S. 526, 538 (2004); it is not the function of the courts to create "public policy" but to enforce a statute "according to its terms." *United States v. Ron Pain Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Cominetti v. United States*, 242 U.S. 470, 485 (1917)). *See also Hartford Underwriter Insurance Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000).

This Court should not enact a public policy, no matter how laudable such a policy might be, that is contrary to the clear language of a statute. The requested result would nullify the express intention of Congress that such claims be included within the scope of the Chapter 13 super discharge. If a Chapter 13 plan can never be proposed in good faith if it results in the discharge of a willful and malicious injury claim, then a Chapter 13 debtor could never obtain a discharge of such claims even though the former Code §1328(a) clearly provided for discharge. Such a construction would render the discharge of willful and malicious injuries provided by §1328(a) as surplusage. This Court has expressed "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. *supra* at 562. What petitioner actually seeks is a ruling imposing this Court's view of what would constitute "sound social policy" and thereby override the express will of Congress.[3]

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[3] Indeed, all of the petitioner's arguments supporting her "sound social policy" are factors under the existing good faith analyses. Petitioner identifies income (by reference to respondent's occupation as a physician), low pro rata payment of petitioner's claim, and dischargeability of her claim. Petitioner characterizes the result as a "miscarriage of justice." Yet, the good faith analyses required in order to obtain

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Petitioner asks this Court to change Congress' clear statutory scheme even though this Court has clearly stated it will not do so:

> In any event, we do not sit to assess the relative merits of different approaches to various bankruptcy problems. It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome – if what petitioner urges is that – is a task for Congress, not the courts. [Citing authority].

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. *supra* at 13-14.

F. Procedural Defects Make this Case a Poor One Upon Which to Create a National Standard.

Petitioner appeals from the entry of a judgment of dischargeability filed in an adversary proceeding. The only issue before the bankruptcy court was whether the petitioner's willful and malicious injury claim was subject to a Chapter 13 discharge. Given the unambiguous statutory language, the bankruptcy court properly found the claim dischargeable.

Petitioner seeks certiorari in a case where the issue to ultimately be addressed, e.g., the respondent's good faith, was not raised and would not have been a proper issue even if raised. There is no ruling from the bankruptcy court on the issue of good faith and no evidentiary record by which to analyze the good faith issue.

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confirmation of a Chapter 13 plan require consideration of these very issues.

G. The Decision Below Is Correct.

The Courts of Appeals, including the Ninth Circuit, are correct in holding that an assault and battery claim against a debtor is dischargeable under Chapter 13. *Allen v. Allen*, 163 Fed. Appx. 598. The applicable version of 11 U.S.C. §1328(a), providing for discharge of debts, rendered debts related to willful and malicious injury caused by the debtor dischargeable in a Chapter 13 bankruptcy. In this case, the Ninth Circuit was also correct in holding that the issue of good faith was not timely nor properly brought to the bankruptcy court's attention. *Id.* There is no basis for this Court to review this correct determination.

IV.

CONCLUSION

Petitioner has advanced no justification for this Court's exercise of certiorari jurisdiction. There are no conflicting decisions on either the dischargeability of willful and malicious injuries or on the determination of good faith. Further, due to revisions to the Bankruptcy Code, the issue presented by the petitioner has little or no continuing significance beyond this case. Petitioner's good faith issue presented to this Court was not raised in the bankruptcy court. Finally, petitioner requests this Court to enter a ruling contrary to the clear will of Congress and upon a procedural background absent of evidence.

The respondent, Christopher Allen, respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

Christopher Allen

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August 14, 2006